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No. 85-844

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CLYDE L. DAVIS, JR.,
Petitioner,

v.

UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UNITED AUTOMOBILE WORKERS LOCAL 970, and CLAUDE PEREIRA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the statutorily prescribed statute of limitations found in § 10(b) of the National Labor Relations Act should govern actions brought under the Labor-Management Reporting and Disclosure Act.

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RESPONDENT'S BRIEF IN OPPOSITION

COUNTER-STATEMENT OF FACTS

For most of the period between 1960 and 1976, Petitioner Clyde Davis was an hourly employee of Ford Motor Company and a member of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and its Local 970 (hereafter "UAW"). During those years Davis held a number of offices within the Local, including President and Vice-President.

On March 16, 1976, Davis was charged with several violations of the UAW Constitution. These charges were "based on alleged threats and intimidation of union members and threats to destroy the local union." (App. 2a)[1]

"In April, 1976, a trial was held before a union trial board in Jacksonville. Davis was served with timely notice of this trial, but chose not to attend the trial or offer any defense, allegedly because of his apprehension that there might be physical altercations between himself and others. On September 14, 1976, Davis was informed that he had been found guilty of the violations as charged, and that he had been expelled from the local and international unions." (App. 2a). "Although expelled from the Unions, Davis apparently did remain at his job with Ford for several more years." (*Id.* n.2)

"Rather than availing himself of available internal UAW appeals processes,[2] . . . Davis filed suit against the local and international unions. In June, 1977, he filed

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[1] The bulk of this Counter-Statement of Facts is taken verbatim from the decision of the Court of Appeals. References to the Petition for Certiorari will be in the form Pet. ——; references to the Appendix to the Petition in the form App. ——.

[2] Petitioner erroneously states that Davis "received no response" to a February 1977 letter to a union official. In fact, the appropriate official responded in writing to Mr. Davis and attempted to inform him that appeals from the union trial board's decision would be processed according to the criteria set forth in the UAW Constitution. Petitioner, however, refused delivery of this registered letter. Counsel for Petitioner has acknowledged this error in a letter to Respondent's counsel.

Petitioner also claims that an official of the Local at one point refused to provide him with a copy of the UAW Constitution. Neither the District Court nor the Court of Appeals made any finding with respect to this allegation. In addition, Petitioner was apparently able to obtain a copy of the Constitution somehow: his February 1977 letter makes an argument based on "my [Davis'] interpretation of the UAW Constitution." (See Appellee's Brief to Court of Appeals at 12 n.5)

a complaint in Florida state court seeking damages for mental anguish, resulting from his alleged wrongful expulsion from the unions. This suit was removed to federal court, remanded to state court, and removed back to federal court, for good, in August, 1978. Meanwhile, in June, 1978, appellant filed a complaint in federal court alleging wrongful expulsion from the unions contrary to federal law and the unions' rules, and seeking damages for loss of wages and physical and mental suffering. In June 1981, the two cases were consolidated." (App. 2a)

"In June, 1981, and again in July, 1982, appellant moved to file an amended complaint. In October, 1983, although the court had not yet ruled on the motions, appellant filed an amended complaint which added allegations that appellant's expulsion was motivated by plaintiff's criticism of union officers, in violation of his right to free speech under section 101(a)(2) of the LMRDA [Labor-Management Reporting and Disclosure Act], 29 U.S.C. § 411(a)(2). Appellant also added allegations that the UAW's internal appeals procedures were unreasonable and that it would be futile for him to exhaust them, and that exhaustion was not necessary because free speech violations were involved. In April, 1984, appellant's motions to amend were denied and the amended complaint was striken." (App. 2a-3a)

Thus, Petitioner's first suit—in state court—was filed a full nine months after being notified of his expulsion. A complaint in federal court—alleging only that the expulsion was "contrary to federal law and [union] rules" —was filed a year thereafter, twenty-one months after the expulsion. And it was not until *seven years* after his expulsion that Petitioner filed an amended complaint —striken by the District Court—pleading a violation of the LMRDA.

"In July, 1984, the district court granted the appellees' motion for summary judgment on the ground that appel-

lant did not exhaust available internal UAW appeals procedures before seeking judicial intervention.[3] Although the court had striken Davis' amended complaint, its order granting summary judgment addressed the allegations in the amended complaint. The court found that the UAW's intricate appellate grievance procedures were reasonable and adequately safeguarded a union member's interests; and that Davis, as a sixteen-year member who had held several local union offices, could not complain about lack of knowledge of the grievance procedures. It found further that appellant's alleged free speech claims involved "threats and intimidation . . . against other union members as well as alleged disparaging statements against the organization;" that these areas touched on the union's internal affairs; and thus that the conduct was not protected free speech either in the traditional sense or within the scope of 29 U.S.C. § 411(a)(2)." (App. 3a-4a)

The Court of Appeals affirmed the summary judgment on statute of limitations grounds. The court, agreeing with the three other circuits which had already decided the LMRDA limitations issue, reasoned that this Court's recent decision in *DelCostello v. Teamsters*, 462 U.S. 151 (1983) mandated application of the six-month limitations period prescribed in § 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(b), to suits arising under the LMRDA. Because Petitioner had not initiated judicial proceedings of any kind within six months after notification of his expulsion, the Court of Appeals found his action time-barred.

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[3] "The UAW [had] raised the statute of limitations issue in district court, but the district court declined to rule on it since it had granted summary judgment for failure to exhaust." (App. 4a n.5)

ARGUMENT

The principal question decided by the court below and raised by petitioners here can be simply stated: should actions by union members under the Labor-Management Reporting and Disclosure Act be governed by the statute of limitations prescribed by Congress in § 10(b) of the National Labor Relations Act. There is no disagreement among the Circuits on this question: five Circuits have answered in the affirmative, and none has reached an opposite conclusion. These decisions represent nothing more than a straightforward application of the principles recently established by this Court in *DelCostello v. Teamsters*, 462 U.S. 151 (1983) to a particular factual context. Because the controlling legal principles have been settled by this Court, and because the lower courts have had no difficulty in applying those principles to the LMRDA setting, review by this Court is unwarranted. (See Part I, pp. 5-11 below.)

Nor is there any reason for this Court to review the retroactivity of the decision below. The retroactivity of *DelCostello* has by now been fully litigated in the Circuits, applying the principles enunciated by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). And every appellate court to rule on the narrow issue presented here has applied its holding retroactively. For these reasons, and because the issue of the retroactivity of § 10(b) is a transitional one which will have no significance once the older cases are adjudicated, the retroactivity issue is not worthy of this Court's attention. (See Part II, pp. 10-12 below.)

I. LIMITATIONS PERIOD

1. Just three years ago, in *DelCostello v. Teamsters*, 462 U.S. 151, this Court established the principles which are to guide federal courts in determining when to "borrow" the limitations period prescribed in Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b),

in cases arising under other Federal labor laws that do not provide a limitations period of their own. Since *DelCostello*, five Circuits have decided the issue presented here: whether, in light of the principles established in *DelCostello*, § 10(b) should govern actions arising under the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 401 *et seq.*

All five of the Circuits to decide the LMRDA limitations issue since *DelCostello*, including the Eleventh Circuit in the present case, have held that *DelCostello* mandates application of the § 10(b) period to actions arising under the LMRDA.[4] *Davis v. UAW*, 765 F.2d 1510 (11th Cir. 1985) (App. 13a-19a); *Local 1397 v. Steelworkers*, 748 F.2d 180 (3rd Cir. 1984); *Linder v. Berge*, 739 F.2d 686, 690 (1st Cir. 1984); *Vallone v. Teamsters*, 755 F.2d 520 (7th Cir. 1984); *Adkins v. International Union of Electrical Workers*, 769 F.2d 330, 335 (6th Cir. 1985). See also, *Miller v. Jeep Corp.*, 774 F.2d 111, 114 n.2 (6th Cir. 1985).[5] No Court of Appeals has reached a contrary conclusion.

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[4] The vast majority of Federal District Courts have reached the same conclusion: *Bigbie v. Teamsters*, —— F. Supp. ——, 114 LRRM 2468 (N.D. Ill. 1983); *Yanick v. Nielsen*, —— F. Supp. ——, 115 LRRM 3295 (N.D. Ca. 1983); *Turco v. Boilermakers*, 592 F. Supp. 1293 (E.D.N.Y. 1984); *McConnell v. Teamsters*, 606 F Supp. 460 (S.D.N.Y. April 10, 1985); *Legutko v. Local 816*, 606 F. Supp. 352, 355-356 (E.D.N.Y. 1985); *but see Gordon v. Winpisinger*, 581 F. Supp. 234 (E.D.N.Y. 1984); *Bernard v. Delivery Drivers*, 587 F. Supp. 524 (D. Colo. 1984).

[5] Petitioner attempts to wish away the significance of three of these cases by claiming that the LMRDA claims involved in those cases were "appended" to duty of fair representation (DFR) claims. (Pet. 9) We know of no reason why joinder of LMRDA claims with DFR allegations would affect the binding nature of the holdings that LMRDA causes of actions are governed by the § 10(b) limitations period. Nor, apparently, do the courts involved: in a subsequent case, the Sixth Circuit characterized *Adkins* as having "held" that the § 10(b) period applies to LMRDA suits. *Miller v. Jeep, supra*, 774 F.2d at 114 n.2. [Continued]

2. In *DelCostello*, the precise issue the Court decided was whether to "borrow" the six-month limitations period governing unfair labor practice cases and apply it to "hybrid" § 301/duty of fair representation claims. In answering that question, the Court established principles which are applicable whenever a court is called upon to decide whether to borrow a federal, rather than a state, limitations period in the context of federal labor law causes of action. These factors include: (i) whether available state periods suit "the realities of labor relations and litigation" (462 U.S. at 167); (ii) whether there is "available a federal statute of limitations actually designed to accommodate a balance of interests . . . similar to that at stake" in the federal suit (*id.* at 169); (iii) whether there is a "family resemblance" or "overlap" between the causes of action statutorily governed by the federal limitations period and those for which a period must be "borrowed" (*id.* at 169-170); and, (iv) whether there is a "similarity of considerations relevant to the choice of limitations period" (*id* at 170-171).

DelCostello applied these factors to the "hybrid" § 301/duty of fair representation suit and concluded that the federal limitations period prescribed in § 10(b) of the NLRA was a "significantly more appropriate vehicle" than a state statute of limitations for enforcement of the federal law. *Id.* at 172.

3. In the wake of *DelCostello*, federal courts have been called upon to apply the principles set forth therein to a wide variety of federal labor relations laws which do not provide limitations periods. Thus, in addition to the LMRDA issue presented here, circuit courts have con-

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[5] [Continued]

In fact, the appearance of LMRDA claims together with DFR allegations demonstrates the "family resemblance" between LMRDA claims and other causes of action governed by the § 10(b) limitations period. As discussed, *infra* at pp. 7-8, and as the lower courts have found, this "family resemblance" militates for application of the § 10(b) period to LMRDA suits.

cluded that § 10(b) should govern non-"hybrid" DFR claims by members against unions, *Erkins v. Steelworkers*, 723 F.2d 837 (11th Cir. 1984), *cert denied*, —— U.S. ——, 104 S.Ct. 3514 (1984), and "hybrid" suits arising under the Railway Labor Act, *see, e.g., Sisco v. Consolidated Rail Corp.*, 732 F.2d 1188 (3rd Cir. 1984), but that state limitations periods are more appropriate for actions for damages caused by unlawful secondary boycotts under § 303 of the Labor-Management Relations Act, 29 U.S.C. § 187. *Monarch v. Soft Drink Workers*, 762 F.2d 228 (2nd Cir. 1985), *cert. denied*, —— U.S. ——, 54 U.S.L.W. 3392. These decisions reflect nothing more than the ordinary process of sorting out the implications of recent decisions of this Court which is precisely the province of the Circuit Courts. And, in this situation, the Circuits have performed this task without any disagreement.

4. The unanimous conclusion of the appellate courts that § 10(b) applies to LMRDA actions represents the proper application of the *DelCostello* principles to the LMRDA context.

Thus, as the Third Circuit stated in the seminal case on this issue:

> Applying [the *DelCostello*] analysis to this appeal, we find that section 10(b) of the NLRA provides a more appropriate limitations period for suits brought under section 102 of the LMRDA than the state limitations periods urged upon us by appellants. As in *DelCostello*, an analogy between unfair labor practice charges and section 102 suits exists not only in practice, but more importantly in the considerations that underlie the choice of a limitations period in the federal labor law field. Further, we believe that a six-month, rather than a longer limitations period, is fair to all parties given the practicalities of most litigation under the LMRDA.
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> * * *
>
> [S]uits brought under a section 102 of the LMRDA do bear a "family resemblance" to unfair labor prac-

> tice charges. *Cf. DelCostello*, 103 S.Ct. at 2293 (finding a "family resemblance" between unfair labor practice charges and breach of the duty of fair representation claims). Both section 8(b)(1) of the NLRA and section 102 are addressed to the same basic concern: the protection of individual workers from arbitrary action by unions, which have been appointed the exclusive representatives of such individuals in the workplace. [*Local 1397*, *supra*, 748 F.2d at 183 (footnotes omitted)].[6]

Finally, as the court below explained:

> In *DelCostello*, the Supreme Court found a strong connection between the national interest in labor peace and the necessity of a short time period in which to bring an action based on a labor union's duty of fair representation. We believe we are bound to find a similar connection between labor peace and an action based on a union's alleged mistreatment of its members by the denial of statutorily protected rights." [App. 8a-9a]

See also, *Local 1397*, 748 F.2d at 183-184; *Adkins*, 769 F.2d at 335; *Vallone*, 755 F.2d at 521-522.

5. Petitioner attempts to manufacture a "split" in the circuits by referring to a case which applied the *DelCostello* principles to a *different issue*—actions under § 303 of the Labor Management Relations Act—and concluded that state limitations periods provided the most apt analogy for such actions. *Monarch v. Soft Drink Workers*, 762 F.2d 228 (2nd Cir. 1985), *cert. denied*, —— U.S. ——, 54 U.S.L.W. 3392. In order to characterize *Monarch* as in "conflict" with the five circuits which have answered the question presented here, Petitioner is forced into a gross misreading of the reasoning of the court below and the other courts that have addressed the LMRDA issue.

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[6] This Court has also recognized the kinship between DFR and LMRDA claims. See, e.g., *NLRB v. Allis-Chalmers*, 388 U.S. 175, 181 (1967) (Congress enacted LMRDA "for the same reason" that Supreme Court developed duty of fair representation). *See also*, *Local 1397*, 748 F.2d at 183 n.3.

Petitioner contends that these decisions have applied § 10(b) to actions under LMRDA simply because such cases are "labor cases", and that therefore there is a "conflict in approach" between the decision below and *Monarch*. (Pet. 10) As we have shown, however, the lower courts have applied the legal principles developed in *DelCostello*—principles significantly more sophisticated than the simple identification of "labor cases"—to the specific question of limitations periods under LMRDA and have unanimously concluded that § 10(b) is the most appropriate limitations period. The fact that another circuit has examined an *entirely different* cause of action under the *DelCostello* principles and concluded that state law provides the most appropriate limitations period does not create a "conflict in approach," let alone a "split in the Circuits" worthy of this Court's review. In fact, the co-existence of *Monarch* and *Davis* demonstrates that circuit courts are properly refusing to read *DelCostello* as mandating a wooden application of § 10(b) to all "labor cases."

II. RETROACTIVITY

Petitioner also argues that the Circuit Court's "retroactive" application of its decision to bind the parties in the instant case requires review by this Court. Review on this issue is unwarranted for several reasons.

First, as with the limitations issue, discussed *supra*, the Circuit Courts facing the retroactivity issue have been called upon *not* to decide a novel question of law but merely to apply to a specific situation principles clearly established by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Not surprisingly, this Court has denied *certiorari ten times* on the issue of retroactive application of *DelCostello* to hybrid § 301/DFR suits.[7]

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[7] *Teamsters v. Edwards*, —— U.S. ——, 52 U.S.L.W. 3682 (March 19, 1984); *Local 1020 v. McNoughton*, —— U.S. ——, 53 U.S.L.W. 3286-87 (Oct. 15, 1984); *Rogers v. Lockheed-Georgia*, —— U.S. ——, 53 U.S.L.W. 3287 (Oct. 15, 1984); *Murray v. Branch Motor Express*, —— U.S. ——, 53 U.S.L.W. 3287 (Oct. 15, 1984); *Erkins v. Steelworkers*, —— U.S. ——, 52 U.S.L.W. 3888 (June 11,

Second, the "retroactivity" of *DelCostello* has been the subject of much follow-up litigation in the Circuits and the overwhelming weight of this authority establishes that *DelCostello* is to be applied retroactively to "hybrid" suits.[8] The five circuits addressing the LMRDA limitations issue have not only been unanimous in applying § 10(b), but have also unanimously followed the weight of this authority and applied their LMRDA decisions retroactively.

Third, the issue of retroactive application of § 10(b) is transitional—arising only in suits commenced prior to establishment of the rule that § 10(b) is applicable. Whatever importance this issue once enjoyed is therefore diminishing as *DelCostello* assumes its position as the recognized authority.

Finally, the unanimous conclusion of the courts of appeals to apply § 10(b) retroactively to LMRDA suits represents a proper understanding and application of *Chevron*. As the Third Circuit explained in *Local 1397*,

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1984); *Welyczko v. U.S. Air*, —— U.S. ——, 53 U.S.L.W. 3395 (Nov. 26, 1984); *Bedat v. McLean Trucking*, —— U.S. ——, 53 U.S.L.W. 3804 (May 13, 1985); *Glover v. United Grocers*, —— U.S. ——, 53 U.S.L.W. 3822 (May 20, 1985); *Rodman v. Hensley*, —— U.S. ——, 53 U.S.L.W. 3730 (April 16, 1985); *Freight Checkers v. Alderson*, —— U.S. ——, 53 U.S.L.W. 3893 (June 24, 1985).

[8] *Graves v. Smith's Transfer Corp.*, 736 F.2d 819 (1st Cir. 1984); *Welyczko v. U.S. Air*, 733 F.2d 239 (2nd Cir. 1984), *cert. denied*, —— U.S. ——; *Perez v. Dana Corp.*, 718 F.2d 581 (3rd Cir. 1983); *Murray v. Branch Motor Express*, 723 F.2d 1146 (4th Cir. 1983), *cert. denied*, —— U.S. ——, 53 U.S.L.W. 3287 (Oct. 15, 1984); *Gray v. Meat Cutters*, 736 F.2d 1055 (5th Cir. 1984); *Smith v. General Motors*, 747 F.2d 372 (6th Cir. 1984) (en banc); *Landahl v. PPG Industries*, 746 F.2d 1312 (7th Cir. 1984); *Lincoln v. District 9*, 723 F.2d 627 (8th Cir. 1983); *Barnett v. United Air Lines*, 738 F.2d 358, 364 (10th Cir. 1984) (applied retroactively without discussion); *Rogers v. Lockheed Georgia*, 720 F.2d 1247 (11th Cir. 1883), *cert. denied*, —— U.S. ——, 53 U.S.L.W. 3287 (Oct. 15, 1984); but see, *Edwards v. Teamsters*, 719 F.2d 1036 (9th Cir. 1983), *cert. denied*, —— U.S. ——, 52 U.S.L.W. 3682 (March 19, 1984).

this is true for several reasons: "the principle of adopting federal, rather than state, limitations periods in the area of federal labor law ha[d] been openly discussed in the courts, and even adopted by some courts prior to *DelCostello*," *Local 1397*, 748 F.2d at 184; *see also*, *Landahl v. PPG Industries*, 746 F.2d 1312, 1314-1315 (7th Cir. 1984); prospective-only application of the limitations rule articulated below would "retard" the operation of that rule by significantly postponing implementation of a uniform federal limitations period, *Local 1397*, 748 F.2d at 184; and retroactive application would not work a significant inequity on the parties, as Congress has explicitly concluded that a six-month period provides the proper balance of equities in a closely-related setting. Indeed, Petitioner here, who inexplicably waited seven years before pleading a violation of the LMRDA, has given every "indication that he is sleeping on his rights, [and] it is [therefore] not inequitable to apply the statute of limitations retroactively to bar his claim." *Perez v. Dana Corp.*, 718 F.2d 581 (3rd Cir. 1983).

Thus, given the availability of the clearly enunciated principles in *Chevron* and the well-developed and persuasive Circuit Court authority applying *Chevron* to *DelCostello*, as well as the transitional nature of the retroactivity question and, not insignificantly, the unanimity of the five circuit courts deciding the narrow issue presented here, further review by this Court is unnecessary.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for certiorari.

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